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Supreme Court, U.S.
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No. 97-602

In the Supreme Court of the United States

OCTOBER TERM, 1997

PARKS B. BANKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether an action by the United States for injunctive relief to remedy the illegal discharge of fill materials into waters of the United States is subject to the statute of limitations that applies to "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture" (28 U.S.C. 2462).

2. Whether saturated lands that are hydrologically connnected to navigable waters through groundwater constitute wetlands within the regulatory scope of the Clean Water Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-15) is reported at 115 F.3d 916. The opinion of the district court (Pet. App. 16-37) is reported at 873 F. Supp. 650.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1997 (Pet. App. 1a-2a). On September 15, 1997, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 2, 1997, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act, 33 U.S.C. 1251 *et seq.*, is designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The central mechanism for meeting that objective is the prohibition against the discharge of pollutants into navigable waters without a permit. See 33 U.S.C. 1311(a), 1344(a). The Act defines the term "navigable waters" comprehensively as "the waters of the United States." 33 U.S.C. 1362(7). The breadth of this definition reflects the intention of Congress

> to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

Section 404(a) of the Act authorizes the Secretary of the Army, acting through the Corps of Engineers, to issue permits for the discharge of "dredged or fill material" into "waters of the United States." 33 U.S.C. 1344(a). The regulations issued under this statute have consistently defined the term "waters of the United States" to encompass a broad range of "wetlands."[1] The "wetlands" within the "waters of

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[1] The term "wetlands" encompasses "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions[,] [which] generally

the United States" include (i) isolated wetlands that may affect interstate commerce, (ii) interstate wetlands and (iii) wetlands that are adjacent to navigable waters or their tributaries. See 33 C.F.R. 328.3(a).

The Corps of Engineers has authority to issue individual permits for specific projects or general regulatory permits for discharges into waters of the United States. Individual permits may be issued only after an opportunity for public comment and only upon an evidentiary record that discloses the nature of the proposed discharges and their anticipated effects. See 33 U.S.C. 1344(a); 33 C.F.R. Pts. 320, 325. A "regulatory" or "nationwide" permit may be issued by the Corps to provide streamlined approval for categories of discharges that (33 U.S.C. 1344(e)(1))

> will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

2. Petitioner owns five tracts of land on Big Pine Key in Monroe County, Florida. He purchased three of the lots in 1980 and the remaining two in 1988. He acknowledges that, beginning in 1980 and continuing into 1983, he destroyed existing vegetation on the three lots he then owned, placed fill on them and planted coconut trees in the fill (Pet. App. 4-5). He also poured a concrete slab and built his winter residence on one of the lots (*ibid.*).

On March 30, 1983, a biologist from the Corps of Engineers informed petitioner that portions of two of the tracts he had filled were wetlands subject to the

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include swamps, marshes, bogs, and similar areas." 33 C.F.R. 328.3(b).

Clean Water Act and that discharges onto those areas were unlawful in the absence of a valid permit. On April 7, 1983, the Corps issued a cease and desist order, stating that enforcement action would be taken against petitioner if he continued to make unpermitted discharges. The order also invited petitioner to apply for an individual permit for filling the wetlands areas (Pet. App. 5).

On April 16, 1983, petitioner applied for an individual permit that would have authorized his discharges retroactively (see 33 C.F.R. 326.3(c) (1983)). Several government agencies and interested members of the public submitted comments opposing that request. The U.S. Fish and Wildlife Service opposed the permit because freshwater wetlands on Big Pine Key provide scarce habitat for the endangered Key Deer, migratory birds and other wildlife. GX 16, at 66. The South Florida Water Management District informed the Corps that state law prohibited the discharges without a "Surface Water Management Permit." Monroe County, which had already taken enforcement action against petitioner for filling one of his lots in violation of a County ordinance, also opposed the application. *Id.* at 72.

On April 5, 1984, the Corps denied the application. In doing so, the Corps stated that petitioner's discharges had "resulted in significant localized adverse impacts to fish and wildlife resources, vegetated wetlands, and water quality." GX 16, at 81. The Corps also found that "less damaging alternatives" to the filling of wetlands were available, such as expansion of petitioner's coconut tree nursery on upland areas (*ibid*). The letter advised petitioner that, unless he contacted the Corps to negotiate restoration

measures, an enforcement action would be commenced (*ibid.*).

Petitioner therafter made no effort to arrange for restoration of the two lots. Instead, he placed additional fill on these areas without a permit (Pet. App. 25). In addition, in March 1988, he acquired two additional lots adjacent to those for which an "after-the-fact" permit had been sought and denied. He proceeded to clear and fill the additional lots between 1988 and 1991 (*id.* at 5).

In 1990, the Corps issued four cease and desist orders to petitioner. Each order stated that petitioner, with notice that his conduct was unlawful, had discharged fill into waters of the United States without a permit. Petitioner responded by filing suit against the Corps. He sought a declaration that his activities did not require a permit and an injunction barring further enforcement actions. The district court dismissed that suit on ripeness grounds. *Banks* v. *Page*, 768 F. Supp. 809 (S.D. Fla. 1991), rev'd in part, vacated in part, 963 F.2d 385 (11th Cir. 1992) (Table) (No. 91-5632).

3. a. On December 19, 1991, the United States filed suit against petitioner, alleging that he had unlawfully discharged fill into waters of the United States. The United States sought an order directing petitioner to remove the unlawful fill and to restore the degraded wetlands or create new wetlands for areas that could not be restored. The government also sought an award of civil penalties against petitioner.

Petitioner moved to dismiss the government's action. He asserted that his discharges were authorized by Nationwide Permit No. 26 (N.P. 26), a regulatory permit issued in 1984 to authorize discharges into certain headwaters and isolated waters, subject

to various protective conditions. Petitioner also asserted that the United States was barred by the statute of limitations from seeking civil penalties for violations of the Clean Water Act that occurred more than five years before the filing of this suit. The statute on which petitioner relies, 28 U.S.C. 2462, provides that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued" (*ibid.*).

The district court denied petitioner's motion. The court held that N.P. 26 does not authorize the filling of "adjacent" wetlands. The court also rejected the limitations defense under 28 U.S.C. 2462 because (i) the United States did not seek any civil penalty for violations that occurred more than five years before the filing of the suit and (ii) the limitations period for actions to enforce civil penalties does not apply to claims by the United States for injunctive relief.

b. The district court then conducted a trial on the merits of the government's claims. Four scientific experts testified that petitioner's lots constituted wetlands under the criteria set forth in the *Wetlands Delineation Manual* issued by the Corps in 1987 (GX 24). These experts also testified that the lots are part of a larger wetlands system, a freshwater slough that spans Big Pine Key from Pine Channel on the west to Bogie Channel on the east. Petitioner called one witness, who testified that only small portions of his lots were wetlands and that none of these areas should be considered adjacent to Pine or Bogie Channels (Pet. App. 23-25).

On this evidentiary record, the district court determined that petitioner's lots constituted wetlands

within the regulatory jurisdiction of the Clean Water Act. The court found that, prior to petitioner's activities, the lots had been dominated by hydrophytic vegetation (Pet. App. 19-21), had been inundated or saturated "for at least five per cent of the growing season" (*id.* at 24) and were covered, over "more than fifty per cent of [their] surfaces," by hydric soils (*id.* at 23). The court further ruled that a "meandering wetland slough" spans Big Pine Key between Pine and Bogie Channels, forming a "band of wetlands [that] is continuous from [petitioner's] Lots to the navigable waters" (*id.* at 18-19). The court reasoned that petitioner's lots, which were a part of this meandering wetlands slough adjacent to the channels, were therefore also adjacent freshwater wetlands, subject to the regulatory jurisdiction of the Clean Water Act (*id.* at 25, 33-34). The district court further determined that N.P. 26 had not authorized discharges into wetlands—such as the freshwater slough that encompasses petitioner's lots—that are adjacent to tidal, navigable waters (*id.* at 36).

Because petitioner's actions violated Section 301(a) of the Clean Water Act, the court enjoined him from discharging additional fill into the lots. After a further hearing on remedies, the district court ordered petitioner to restore the wetlands and to pay $10,000 in civil penalties (Pet. App. 40-46).

4. The court of appeals affirmed (Pet. App. 3-15). On the statute of limitations issue, the court held that the plain language of 28 U.S.C. 2462 applies only to actions to enforce "any civil fine, penalty, or forfeiture" and thus "does not apply to equitable remedies" (Pet. App. 7). The court of appeals rejected petitioner's reliance upon the "concurrent remedy rule," under which an equity court exercising "concurrent

jurisdiction" to enforce a legal obligation "will withhold its relief * * * where the applicable statute of limitations would bar the concurrent legal remedy" (*id.* at 7-8, quoting *Cope* v. *Anderson*, 331 U.S. 461, 464 (1947)). The court of appeals stated that application of the concurrent remedy rule to the equitable remedies established under federal law for the United States would be improper because, in the absence of "a clear expression of Congress to the contrary[,] a statute of limitation does not apply to claims brought by the federal government in its sovereign capacity" (Pet. App. 8).

The court of appeals upheld the judgment of the district court on the merits. The court held (i) that the factual determination that petitioner's lands "have the hydrological connection needed to qualify as adjacent wetlands" was not clearly erroneous (Pet. App. 13) and (ii) that petitioner had failed to establish that his activities were permitted by N.P. 26 (*id.* at 13-15).

DISCUSSION

There is a conflict among the courts of appeals on the question whether an action by the United States for equitable relief is governed by the statute of limitations that applies to actions "for the enforcement of any civil fine, penalty, or forfeiture" (28 U.S.C. 2462). For the reasons explained in the petition filed by the government in *Federal Election Commission* v. *Williams*, No. 97-601, review by this Court to resolve that conflict is warranted.[2]

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[2] We are providing herewith to petitioner a copy of the government's petition in No. 97-601.

There is, however, no conflict among the circuits on any of the remaining questions presented in this case. Nor do those questions concern matters of recurring importance. Further review of those questions is thus not warranted.

1. This case presents the same question presented in *Federal Election Commission* v. *Williams*, No. 97-601. In that case, the United States sought an injunction barring future violations by an individual of the substantive prohibitions of the Federal Election Campaign Act of 1971. The Ninth Circuit held in *Williams* that 28 U.S.C. 2462 governs claims for equitable relief by the United States for violations of federal law because, when the "claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both." 104 F.3d 237, 240 (1996). That holding in *Williams* conflicts with the conclusion of the court of appeals in this case that "section 2462 does not apply to equitable remedies" (Pet. App. 7).

The petition in the present case should therefore be held and disposed of as appropriate in light of the Court's disposition of the petition in *Williams*.

2. The petition in the present case raises three additional questions that do not warrant review by this Court. Because petitioner concedes that two of these additional questions lack sufficient importance to warrant further review (Pet. 18-19), we will address only the remaining question.[3] That question

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[3] The petition states that the third and fourth questions presented, whether caprock limestone can be jurisdictional wetlands and whether N.P. 26 exempts all activities on land that is "non-tidal" and "not part of a surface tributary system" from regulation pursuant to the Clean Water Act (Pet. i), do not independently warrant review, but are included "in the event

is whether the record of this case supports the conclusion that the lots owned by petitioner constitute wetlands subject to regulation under the Clean Water Act.

Petitioner errs in contending (Pet. 6-14) that the determination that the saturated lands at issue in this case constitute wetlands because they are hydrologically connected to neighboring navigable waters through groundwater conflicts with case authority interpreting the jurisdictional reach of the Clean Water Act. Petitioner incorrectly asserts (Pet. 7-10) that several courts of appeals have held that groundwater connections with navigable waters are not sufficient to establish Clean Water Act jurisdiction over wetlands. The cases cited by petitioner, however, do not address the delineation of adjacent wetlands.[4] Instead, these cases address the question whether groundwater is itself subject to regulation pursuant to the Clean Water Act. That question is not presented in this case.

The question here is, instead, whether the existence of a groundwater connection between wetlands and other waters of the United States is an appropriate basis for a determination whether wetlands are "adjacent" to other regulated waters (Pet. App. 12-13). The ruling of the court of appeals in this case that the

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this Court considers them important enough to be considered in the context of the balance of the case" (Pet. 19).

[4] *Village of Oconomowoc Lake* v. *Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.); cert. denied, 513 U.S. 930 (1994); *Town of Norfolk* v. *United States Army Corps of Engineers*, 968 F.2d 1438 (1st Cir. 1992); *Quivira Mining Co.* v. *United States Envtl. Protection Agency*, 765 F.2d 126 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986); and *Exxon Corp.* v. *Train*, 554 F.2d 1310 (5th Cir. 1977).

filled lands are "wetlands" is consistent with the regulatory definition of wetlands as "those areas that are inundated or saturated by surface *or ground water* at a frequency and duration sufficient to support * * * vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 328.3(b) (emphasis added). As this Court observed in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 (1985), this definition "could hardly state more clearly that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands."

In a holding consistent with *United States* v. *Tilton*, 705 F.2d 429 (11th Cir. 1983), the court of appeals further concluded in this case that petitioner's lands fell within the regulatory definition of "adjacent wetlands." That term is defined to include "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." 33 C.F.R. 328.3(c). The district court found that petitioner's lands were part of a continuous "meandering wetland slough" that traverses Big Pine Key from Pine Channel to Bogie Channel (Pet. App. 18-19). Evidence in the record supported the finding that this slough, consisting of lands saturated and connected by groundwater, falls within the regulatory definition of "adjacent wetlands" due to its proximity and connection to both channels (*id.* at 25, 33-34). The court of appeals correctly concluded that neither the location of petitioner's lands at a point within the slough that is one-half mile distant from the channels nor the separation of those lands from the remainder of the wetlands by Watson Boulevard affects the determination that the lands are "adjacent wetlands" as defined

by 33 C.F.R. 328.3(c)—for all of the lands within the slough are hydrologically connected with navigable, tidal waters (Pet. App. 12-13). Further review of the factual determinations "concurred in by two lower courts" (*Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982)) is not warranted. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

CONCLUSION

With respect to the statute of limitations question, the petition for a writ of certiorari should be held and disposed of in light of the disposition of the petition in *Federal Election Commission* v. *Williams*, No. 97-601. With respect to the remaining questions, the petition should be denied.

Respectfully submitted.

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